Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,

Cross-Petitioner,

v.

DONALD R. BUCHANAN,

Cross-Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

CONDITIONAL CROSS-PETITION

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56 pp

QUESTIONS PRESENTED

1. Whether equal footing terminates temporary hunting rights at statehood? This Court's equal footing precedent is in conflict requiring clarification.

2. Whether the court below ignored the ordinary, contemporary, and legal meaning of the language "open and unclaimed" contained in the stevens' treaties?

3. Whether the opinion of the court below is inconsistent with *Minnesota v. Mille Lacs Band of Chippewa Indians* by restricting Washington's power to regulate off-reservation hunting by members of treaty tribes only after proof of closure of all citizen hunting and proof that a species of wildlife is in danger of extinction?

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Appendix — Enabling Act 1a

The State of Washington, respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Washington in *State v. Buchanan*, 138 Wash. 2d 186, 978 P.2d 1070 (1999).

OPINIONS BELOW

The decision of the Supreme Court of Washington, officially reported at 138 Wash. 2d 186, 978 P.2d 1070 (1999), is reprinted in the appendix of the Petitioner (Pet. App. at A1-28). Other relevant prior orders include: the opinion of the Washington State Court of Appeals, Div. III, reported at 87 Wash. App. 189, 941 P.2d 683 (1997), and is reprinted at Pet. App. B1-8; and the Yakima County Superior Court's Findings of Fact and Conclusions of Law supporting the Order of Dismissal are reprinted at Pet. App. C1-7.

STATEMENT OF JURISDICTION

The Washington Supreme Court filed its judgment on June 17, 1999. (Pet. App. A-1). Petitioner filed a motion for reconsideration which was denied on August 3, 1999. (Pet. App. D-1). The petition for writ of certiorari was docketed on November 4, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a) and Rule 12.5 of the Rules of the Supreme Court of the United States and is conditional upon this Court's grant of Petitioner's petition for a writ of certiorari.

STATUTES AND TREATIES INVOLVED

The Treaty of Point Elliot, January 22, 1855, 12 Stat. 927, reprinted in Pet. App. E1-7.

STATEMENT OF THE CASE

On January 6, 1995, Donald Buchanan was stopped by wildlife enforcement officers while hunting on land owned and managed by the State of Washington in the eastern part of the state. He possessed two recently killed five-point, branch-antlered bull elk while the state elk hunting season was closed and his state hunting license was revoked.

Buchanan lives in Kent, Washington, a Seattle suburb, west of the Cascade Mountains. He is an enrolled member of the Nooksack Indian Tribe. The Nooksack reservation is in Whatcom County — west of the Cascade Mountains and Washington's tribe nearest the Canadian border. The lands ceded to the United States by the Nooksack Tribe under the Treaty of Point Elliott are bordered on the east by the summit of the Cascade range. Thus, Buchanan hunted on the other side of the Cascade Mountains from his tribe's ceded land and from his home.

The State charged Buchanan with possessing big game during closed season and hunting while his license was revoked. He moved to dismiss claiming the State's regulations do not apply to him because he has the treaty right to hunt on open and unclaimed lands. He alleged the only regulations governing tribal hunting on open and unclaimed lands are Nooksack tribal regulations.

The trial court dismissed the charges and ruled the treaty gives tribal members a right to hunt anywhere in the "Territory of Washington." The State appealed the dismissal. The Court of Appeals affirmed. The State appealed to the Washington State Supreme Court. The Washington State Supreme Court unanimously held these hunting rights are

geographically available in the ceded territory and may include other areas if they are proven to have been actually used for hunting and occupied by the Nooksacks over an extended period of time.

REASONS FOR GRANTING THE WRIT

I.

EQUAL FOOTING TERMINATES TEMPORARY HUNTING RIGHTS AT STATEHOOD. THIS COURT'S EQUAL FOOTING PRECEDENT IS IN CONFLICT REQUIRING CLARIFICATION.

Because the Supreme Court of Washington misreads *Minnesota v. Mille Lacs Band of Chippewa Indians,* 119 S. Ct. 1187 (1999), and believes *Ward v. Race Horse,* 163 U.S. 504 (1896) has been effectively overruled, clarification of the equal footing doctrine is needed from this Court. Additionally, *Buchanan's* holding produced a very complicated fact-based test for determining whether Indians have a right to hunt off-reservation. The problem of applying this test to determine off-reservation hunting rights is not unique to Washington, but applies equally to the states of Oregon, Idaho and Montana since there are treaties in each state with exactly the same language as Washington's.

In *Mille Lacs* this Court found that if the right to hunt was clearly temporary and a treaty so provided, then that right could be terminated by the equal footing doctrine as set out in *Race Horse Mille Lacs,* 119 S. Ct. at 1205-06, *citing Race Horse,* 163 U.S. at 514-15. The Washington Supreme Court clearly found the Washington hunting right was temporary and all the parties understood that it was temporary. *State v. Buchanan,* 138 Wn. 2d 186, 206, 978 P.2d 1070 (1999).

This Court also analyzed off-reservation hunting rights in *Oregon Fish & Wildlife Dept. v. Klamath Tribe*, 473 U.S. 753 (1985), if the right to hunt off- reservation is not clearly stated then such right does not exist. *Klamath* also reiterated the rule that the rights of tribal members off-reservation are limited and generally subject to state law:

> Our cases have recognized that tribal sovereignty contains "a significant geographic component." Thus the off-reservation activities of Indians are generally subject to the prescriptions of a "nondiscriminatory state law" in the absence of express federal law to the contrary. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335, n. 18 (1983) (citations omitted). *See also Kake Village v. Egan*, 369 U.S. 60, 75 (1962) ("State authority over Indians is . . . more extensive over activities . . . not on any reservation").

Klamath at n.16.

Buchanan held the "treaty hunting right, by its terms, is of a temporary and self-limiting nature. The right was intended to diminish as lands became settled, without the need of congressional action." *Buchanan*, 138 Wn. 2d at 206, *citing as an example United States v. Hicks*, 587 F. Supp. 1162, 1165 (W.D. Wash. 1984). Consistent with *Klamath*, *Buchanan* correctly recognizes the temporary nature of the Nooksack off-reservation hunting right.

The problem is *Buchanan's* attempt to determine the continued vitality of an admittedly temporary hunting right. The State urged *Buchanan* to hold, consistent with *Race*

Horse, that the temporary hunting right ended at statehood. This would have resulted in a clear rule that tribal members could not hunt off-reservation except under the same rules as all citizens of the state.

Chief Justice Rehnquist recently reiterated the temporary nature of the hunting right based on language similar to Washington's:

> In *Ward v. Race Horse*, 163 U.S. 504 (1896), we held that a Treaty granting the Indians "the right to hunt on the unoccupied lands of the United States, so long as game may be found thereon, and so long as peace subsists among the whites and the Indians on the borders of the hunting districts" did not survive the admission of Wyoming to the Union since the Treaty right was "temporary and precarious."

Mille Lacs, 119 S. Ct. at 1211 (Rehnquist, Chief Justice, dissenting).

One can interpret *Mille Lacs* as affirming *Race Horse:*

> The equal footing doctrine was only part of the holding in *Race Horse*, however. We also announced an alternative holding: The Treaty rights at issue were not intended to survive Wyoming's statehood. We acknowledged that Congress, in the exercise of its authority over territorial lands, has the power to secure off-reservation usufructuary rights to Indian Tribes through a treaty, and that "it would also be within the power of Congress to continue them in the

> State, on its admission into the union." *Race Horse*, 163 U.S. at 515. We also acknowledged that if Congress intended the rights to survive statehood, there was no need for Congress to preserve those rights explicitly in the statehood Act. We concluded, however, that the particular rights in the treaty at issue there — "*the right to hunt on the unoccupied lands of the United States' — were not intended to survive statehood.*" *Id.*, at 514-515 (emphasis added).
>
> . . . Moreover, unlike the rights at issue in *Race Horse*, there is no fixed termination point to the 1837 Treaty rights. The Treaty in *Race Horse* contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned by the United States; the happening of these conditions was "clearly contemplated" when the Treaty was ratified. *Id.*, at 509.

Mille Lacs, 119 S. Ct. at 1205-06 (O'Connor, J.).

Contrary to this reading of *Mille Lacs* and to *Race Horse*, *Buchanan* held the temporary treaty hunting right survived statehood. *Buchanan* should have followed *Mille Lacs* because "the right to hunt on the unoccupied land" was not intended to survive statehood.

Since by definition a temporary right ends at some point in time, the better reasoning is that of *Race Horse*, where this Court correctly held the temporary and precarious nature of the hunting right did not survive Wyoming's statehood. *Accord*: *New York ex rel. Kennedy v. Becker*, 241 U.S. 556,

564 (1916); *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995); *State v. McCoy*, 63 Wn. 2d 421, 387 P.2d 942 (1963). Additionally, under principles of *stare decisis*, *Buchanan* erroneously failed to follow *Mille Lacs* since *Buchanan's* treaty language is nearly identical to the treaty language *Mille Lacs* declared ended the hunting right at statehood. This Court should apply the better reasoning of *Race Horse, Kennedy,* and *Mille Lacs* to *Buchanan*. *Buchanan* clearly erred holding the treaty hunting right survived Washington's statehood under the equal footing doctrine.

The constitutional basis for equal footing is clear. Article IV, Section 3, Constitution of the United States reads:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Thus, statehood enactments by Congress are constitutionally grounded and are compacts between the United States and the new State. Enabling acts which condition statehood in a manner depriving a new state of its equality with the police power of other states are unconstitutional according to many decisions of this Court.

Washington's Enabling Act, 25 Stat. 676 (1889) (Cross-Petitioner's Appendix A), contains no express limitation upon its police power to regulate the time, place or manner of taking wildlife. Neither does the Treaty of Point Elliott,

123 Stat. 927, expressly limit a state's power to regulate its wildlife resources.

This Court has repeatedly adjudicated the rights and duties of states admitted into the Union after 1789. Significantly:

> Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power . . . (N)o jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States . . .

New Orleans v. United States, 35 U.S. (10 Pet.) 662, 735-36 (1836).

In the treaty context, state sovereignty includes the ability to regulate wildlife. This Court in *Winans* held the right of taking fish at all usual and accustomed places does not "restrain the state unreasonably, if at all, in the regulation of the right." 198 U.S. 371, 384 (1905), *cited with approval*: *Kennedy v. Becker*, 241 U.S. at 563-64; *Klamath*, 473 U.S. at 753 n. 16.

Indian treaties must comply with the Constitution. *Reid v. Covert*, 354 U.S. 1, 16-17 (1956).

Buchanan ignored the constitutional significance of the equal footing doctrine correctly applied in *Race Horse*, and the concomitant presumption against limiting a new state's sovereignty. *Buchanan*, 138 Wn. 2d at 211-12, *relying on United States v. Dion*, 476 U.S. 734, 738 (1986). *Dion* held

an intent to abrogate Indian treaty rights must be "clear and plain" and such language is absent from Washington's Enabling Act. *Accord: Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 690 (1979).

The problem of applying *Dion* to *Buchanan* (or any other off-reservation hunting case) is that *Dion dealt only with on-reservation hunting rights* — an entirely different issue not implicating state sovereignty over state rather than tribal land. *Buchanan* incorrectly relied on *Dion* when it rejected the equal footing doctrine.

Contrary to the constitutional requirements of sovereignty, *Mille Lacs* (and *Buchanan* in reliance) gives state and tribal governments equal management of wildlife resources. *Kennedy* explicitly rejected this duality of sovereignty, because instead of maintaining in each the essential power of preservation, duality would in fact deny it to both. *Kennedy*, 241 U.S. at 563.

The current rule is also utterly impractical to enforce. The difficulty of "shared" hunting management of off-reservation land in a state like Washington is clear. Several tribes live in this state. As many as eight tribes live in one area. This translates to *eight other sovereign governments* expected to manage off-reservation hunting as the state's co-equals *on the same piece of land.*

The better rule both analytically and practically is that states are constitutionally empowered by virtue of their sovereignty to regulate off-reservation Indian hunting, as recognized by *Race Horse* and rejected by *Buchanan*. The current rule of joint management between the state and the tribes is unworkable.

Analytically, *Buchanan* conflicts with prior Supreme Court precedent, misapplies *Dion,* and its treaty interpretation exceeds constitutional limits. *Reid, supra.* Most importantly, *Buchanan* raises a significant question of federalism warranting clarification. As Justice Thomas noted in his *Mille Lacs* dissent, the "serious federalism costs" exacted by diminution and dilution of a state's police power by treaty interpretation in derogation of a state's rights under the equal footing doctrine merit review. *Mille Lacs,* 119 S. Ct. at 1212 (Thomas, J. dissenting).

A clear rule from this Court is needed to protect both wildlife resources and tribal hunters.

II.

THE COURT BELOW FAILED TO RECOGNIZE THE TEMPORARY NATURE OF THE HUNTING PRIVILEGE AND THUS FAILED TO INTERPRET THE MEANING OF "OPEN AND UNCLAIMED" LANDS.

The court below held that "public-owned lands, which are not obviously occupied and which are put to a use which is compatible with hunting, are 'open and unclaimed lands' under the terms of the Stevens Treaties." *State v. Buchanan,* 138 Wn.2d 186, 211, 978 P.2d 1070 (1999). This principal of law ignores the practical meaning given the term by the parties to the Treaty of Point Elliot. Both parties knew that the Pacific Northwest was to be opened and that lands were to be claimed by settlers as apart of the Nation's "manifest destiny."

The Treaty of Point Elliott, 12 Stat. 927, Article 5, (Pet. App. E), provided for "the privilege of hunting and

gathering roots and berries on open and unclaimed lands." The meaning of "open and unclaimed" has been the subject of several court opinions. In *Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied* 134 L. Ed. 2d 951 (1996), the court held:

> When the Treaty with the Crows, 1868, was executed the lands located in what is now the Big Horn National Forest were unoccupied; they were open for settlement in the westward expansion of the United States. However, in 1887, Congress created the Big Horn National Forest and expressly managed and regulated for the specific purposes of improving and protecting the forest, securing favorable water flows, and furnishing a continuous supply of timber.[1] *See* 16 U.S.C. § 475. These lands were no longer available for settlement. No longer could anyone timber, mine, log, graze cattle, or homestead on these lands without federal permission. *See* Act of June 4, 1897, Ch. 2, 30 Stat. at 35-36 (1897). Thus, the creation of the Big Horn National Forest resulted in the "occupation" of the land.

Repsis, 73 F.3d at 993.

Just as national forest lands are no longer open for settlement based on federal ownership and use, so is the Oak Creek Wildlife Area public land owed by the State of

1. [4] In 1960, Congress passed the Multiple-Use Sustained Yield Act of 1960 which provided that "national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" as well as the original purposes set forth in 16 U.S.C. § 475. 16 U.S.C. § 528.

Washington. Public lands of the State of Washington are lands belonging to or held in trust by the state, which are devoted to or reserved for a particular use by law, such as support of public schools, colleges, universities and state charitable, penal and reformatory institutions. Revised Code of Washington, 79.01.004. No one can harvest timber, graze cattle, or raise crops on Washington State public lands without approval of the Department of Natural Resources, and pay compensation to the State for such activity.

The court below relied upon inconsistent state court interpretations of the meaning of "open and unclaimed". *See Buchanan*, 138 Wn. 2d at 209, 978 P.2d 1070 (1999). The circuit court in *Mille Lacs Band of Chippewa Indians v. Minnesota,* 124 F.3d 904, 927 (1997), acknowledged the hunting rights in *Respis* were "temporary and precarious". In describing the nature of the hunting "rights" in *Repsis*, the Eighth Circuit in *Mille Lacs* stated:

> The treaties in *Ward* and *Repsis* reserved rights on the "unoccupied lands of the United States." The standard of when "unoccupied" lands become "occupied" is certainly vague, and could logically include the granting of sovereignty to a newly formed state. *See Fond du Lac*, slip op. at 31. Moreover, in Ward, the Court interpreted the treaty rights therein to secure the right to hunt in hunting districts on lands owned by the United States. *See Ward*, 163 U.S. at 509-10, 16 S. Ct. at 1078. Therefore, the Court found the rights to be tied to the United States' ownership of the lands. In contrast, the rights secured to the Bands in Article 5 of the 1837 Treaty are in no way tied to ownership, but instead were intended to be continuing rights.

The language involving usufructurary rights to hunt as used in the Treaty with the Crows, 1868, and the Treaty of Point Elliot, 12 Stat. 927, use similar language. The court below should have used the reasoning in *Repsis*, instead of applying the state court analysis that it did. It is important to address this issue since many treaties within the States of Washington, Idaho and Montana, were Indian treaties negotiated by Territorial Governor Isaac Stevens,[2] and contain similar language. The record of negotiations and practical construction of the hunting language in the

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2. The Buchanan Court listed the treaties as follows: Treaty Between the United States and the Walla-Walla, Cayuses, and Umatilla Tribes and Bands of Indians in Washington and Oregon Territories, June 9, 1855, art. I, 12 Stat. 945, 946 [hereinafter Treaty Between the Walla-Wallas]; Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, art. III, para. 2, 12 Stat. 951, 953 [hereinafter Treaty Between the Yakamas]; Treaty Between the United States and the Nez Perce, Indians, June 11, 1855, art. III, para. 2, 12 Stat. 957, 958 [hereinafter Treaty Between the Nez Perce] [involving lands in State of Idaho]; Treaty Between the United States and the Flathead, Kootenay and Upper Pend d'Oreilles Indians, July 16, 1855, art. III, para. 2, 12 Stat. 975, 976 [hereinafter Treaty Between the Flatheads] [involving lands in States of Idaho and Montana]. In some the privilege to hunt and gather roots and berries also includes the right to pasture cattle and horses on open and unclaimed land. *See, e.g.*, Treaty Between the Walla-Wallas, 12 Stat. at 946; Treaty Between the Yakamas, 12 Stat. at 953; Treaty Between the Nez Perce, 12 Stat. at 958 [lands in State of Idaho]; Treaty Between the United States and the Qui-nai-elt and Quil-leh-ute Indians, Jan. 25, 1856, art. III, 12 Stat. 971, 972; Treaty Between the Flatheads, 12 Stat. at 976 [involving lands in the State of Montana]. The Treaty between the United States and the Makah Tribe also secures to the tribe the right of whaling or sealing at usual and accustomed grounds. Treaty Between the United States and the Makah Tribe of Indians, Jan. 31, 1855, art. IV, 12 Stat. 939, 940.

Stevens'Treaties varies from Treaty to Treaty and tribe to tribe. For example, the fish-eating Indians of Pudget Sound were much less dependent upon game for food than the equestrian plains-type Indians of Eastern Washington and Montana.

III.

THE OPINION BELOW IS INCONSISTENT WITH THE COURT'S RECENT MILLE LACS OPINION.

An alternative reason for review of the opinion below is shown by *Dion*, 476 U.S. at 738 n.5, which reserved the question of whether a treaty Indian's hunting "is outside the scope of the treaty right because that right does not protect hunting ' to extinction'." The opinion below relied upon *State v. Miller*, 102 Wn.2d 678, 687-688, 689 P.2d 81 (1984). *Miller* held that Washington must prove that its wildlife time, place, and manner laws are necessary for conservation by "a regulation required for perpetuation of a species of game within a certain zone." *Id.* Requiring proof of a need to perpetuate a game species in a given area is but another way of requiring proof that the species is in imminent danger of extinction. If Washington must shoulder such a burden, it is clear that its sovereignty over its natural resources has been virtually destroyed. Washington, in order to meet its burden of proof, must show that citizen harvest has been eliminated and that the game species is in danger of extinction. Application of State time, place, and manner laws to Treaty Indian hunting will perhaps occur under uncertain future conditions.

This standard runs contrary to that set forth by the Court in *Mille Lacs,* where the Court held:

> . . . this Court's cases have also recognized that Indian treaty-based usufructuary rights do not guarantee the Indians "absolute freedom" from state regulation. *Oregon Dept. of Fish and Wildlife* v. *Klamath Tribe,* 473 U.S., at 765, n. 16. We have repeatedly reaffirmed state authority to impose reasonable and necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation. See *Puyallup Tribe* v. *Department of Game of Wash.,* 391 U.S. 392, 398 (1968); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn., supra,* at 682; *Antoine* v. *Washington, supra,* at 207-208. This "conservation necessity" standard accommodates both the State's interest in management of its natural resources and the Chippewa's federally guaranteed treaty rights. Thus, because treaty rights are reconcilable with state sovereignty over natural resources, statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries.

Mille Lacs, 119 S. Ct. at 1204-05 (per O'Connor, J.).

The "dual sovereignty" that was recognized by the Court in *Mille Lacs* cannot work in Washington since the tribes in Washington do not have the resources to manage game throughout the State. The tribes also lack the ability to

enforce hunting regulations over such a large area. In several of the ceded areas in the State of Washington up to eight or nine tribes may have "ceded" such lands, since they are all signatories to the treaty that ceded such lands. In addition, the State of Washington is involved in game management. Because the tribes all have sovereign immunity, the State of Washington is unable to compel hunting management information from the tribes sharing management of the same land.

In the case at hand, the defendant was hunting in January, in an area where the Washington State Department of Wildlife was operating a feeding station for elk, to help them survive through the winter. This is an unnatural condition that attracts elk in a concentrated area. The elk herd could be severely reduced if, without state regulation, hunting were allowed to take place at this time and in this area, as the Nooksack tribe permitted Mr. Buchanan to do, if others followed suit. At least one other Western Washington Indian tribe has issued a permit for a tribal member to hunt in the same area.

The Court's holding in *Mille Lacs,* providing for dual sovereignty, runs contrary to the Court's holding in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563 (1916), where the Court stated:

> As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situations was to be." We are unable to take this view. It is said that the state would regulate the whites and that the Indian

> tribe would regulate its members, but if neither could exercise authority with respect to the other at the locus in quo, either would be free to destroy the subject of the power. Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both . . . But the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not thing that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible.

If, as the court below ruled, extinction of a game species in a given habitat is the measure of a State's governmental authority to apply its wildlife time, place, and manner laws, such treaty rights are most surely inconsistent with a State's sovereignty over natural resources. The Court needs to set the rule straight and give guidance to the State and tribes involved. The reasoned approach should be:

> . . . the general rule is that the off-reservation activities of Indians are subject to a State's nondiscriminatory laws, absent express federal law to the contrary. See, *e.g.* . *Oregon Dept. of Fish and Wildlife v. Klamath Tribe,* 473 U.S. 753, 765, n.16 (1985); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 335, n.18 (1983). The majority, however, overlooks the fact that the scope of a State's regulatory authority depends

> upon the language of the treaty in question. At a *minimum*, States may issue and enforce those regulations of Indians' off-reservation usufructurary activities that are necessary in the interest of conservation. Our decisions suggest that state regulatory authority is so limited when, with the treaty in question, the Indians reserved a *right* to fish, hunt, or gather on ceded lands. But it is doubtful that the so-called "conservation necessity" standard applies in cases, such as this one, where Indians reserved no more than a *privilege* to hunt, fish, and gather.

Mille Lacs, 119 S. Ct. at 1213 (Thomas, J., dissenting).

CONCLUSION

For foregoing reasons, should the Court grant the petition for writ of certiorari, it should also grant this conditional cross-petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — ENABLING ACT

AN ACT to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

(Approved February 22, 1889.) [25 U.S. Statutes at Large. c 180 p 676.]

[President's proclamation declaring Washington a state: 26 St. at Large. Proclamations, p 10, Nov. 11, 1889.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

SEC. 2. The area comprising the Territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said Territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall, at the same time, assemble in convention at the city of Sioux Falls.

SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States; and the qualifications for delegates to such conventions shall be such as by the laws of said Territories respectively persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of said counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief-justice, and the secretary of said Territories; and the governors of said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of the said Territories regulating elections therein for Delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all

persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and

title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof, that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

SEC. 5. That the convention which shall assemble at Bismarck shall form a constitution and State government for a State to be known as North Dakota, and the convention which shall assemble at Sioux Falls shall form a constitution and State government for a State to be known as South Dakota: *Provided*, That at the election for delegates to the constitutional convention in South Dakota, as hereinbefore provided, each elector may have written or printed on his ballot the words "For the Sioux Falls constitution," or the words "Against the Sioux Falls constitution," and the votes on this question shall be returned and canvassed in the same manner as for the election provided for in section three of this act; and if a majority of all votes cast on this question shall be "for the Sioux Falls constitution" it shall be the duty of the convention which may assemble at Sioux Falls, as herein provided, to resubmit to the people of South Dakota, for ratification or rejection at the election hereinafter provided for in this act, the constitution framed at Sioux Falls and adopted November third, eighteen hundred and eighty-five, and also the articles and propositions separately submitted at the election, including the question of locating the temporary seat of government, with such changes only as relate to the name and boundary of the proposed State, to the re-apportionment of the judicial and legislative districts, and such amendments as may be necessary in order to comply with the provisions of this act; and if a majority of the votes cast on the ratification or rejection of the constitution shall be for the constitution irrespective of the articles separately submitted, the State of South Dakota shall be admitted as a State in the Union under said constitution as hereinafter provided; but the archives, records, and books of the Territory of Dakota shall remain at Bismarck, the capital of North

Dakota, until an agreement in reference thereto is reached by said States. But if at the election for delegates to the constitutional convention in South Dakota a majority of all the votes cast at that election shall be "against the Sioux Falls constitution", then and in that event it shall be the duty of the convention which will assemble at the city of Sioux Falls on the fourth day of July, eighteen hundred and eighty-nine, to proceed to form a constitution and State government as provided in this act the same as if that question had not been submitted to a vote of the people of South Dakota.

SEC. 6. It shall be the duty of the constitutional conventions of North Dakota and South Dakota to appoint a joint commission, to be composed of not less than three members of each convention, whose duty it shall be to assemble at Bismarck, the present seat of government of said Territory, and agree upon an equitable division of all property belonging to the Territory of Dakota, the disposition of all public records, and also adjust and agree upon the amount of the debts and liabilities of the Territory, which shall be assumed and paid by each of the proposed States of North Dakota and South Dakota; and the agreement reached respecting the Territorial debts and liabilities shall be incorporated in the respective constitutions, and each of said States shall obligate itself to pay its proportion of such debts and liabilities the same as if they had been created by such States respectively.

SEC. 7. If the constitutions formed for both North Dakota and South Dakota shall be rejected by the people at the elections for the ratification or rejection of their respective

constitutions as provided for in this act, the Territorial government of Dakota shall continue in existence the same as if this act had not been passed. But if the constitution formed for either North Dakota or South Dakota shall be rejected by the people, that part of the Territory so rejecting its proposed constitution shall continue under the Territorial government of the present Territory of Dakota, but shall, after the State adopting its constitution is admitted into the Union, be called by the name of the Territory of North Dakota or South Dakota, as the case may be: *Provided*, That if either of the proposed States provided for in this act shall reject the constitution which may be submitted for ratification or rejection at the election provided therefor, the governor of the Territory in which such proposed constitution was rejected shall issue his proclamation reconvening the delegates elected to the convention which formed such rejected constitution, fixing the time and place at which said delegates shall assemble; and when so assembled they shall proceed to form another constitution or to amend the rejected constitution, and shall submit such new constitution or amended constitution to the people of the proposed State for ratification or rejection, at such time as said convention may determine; and all the provisions of this act, so far as applicable, shall apply to such convention so reassembled and to the constitution which may be formed, its ratification or rejection, and to the admission of the proposed State.

SEC. 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for

ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed State on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who with the governor and chief-justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as

herein provided shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

SEC. 9. That until the next general census, or until otherwise provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution and the States, respectively, are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories.

SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations

for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

SEC. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

Reviser's note: Section 11 has at various times been amended by Congress as follows:

(1) August 11, 1921:

AN ACT To amend an Act approved February 22, 1889, entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States."

Appendix

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 11 of the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," approved February 22, 1889, be, and the same hereby is, amended by adding the following: *Provided, however*, That the State may, upon such terms as it may prescribe, grant such easements or rights in such lands as may be acquired in, to, or over the lands of private properties through proceedings in eminent domain: *And provided further*, That any of such granted lands found, after title thereto has vested in the State, to be mineral in character, may be leased for a period not longer than twenty years upon such terms and conditions as the legislature may prescribe. [42 U.S. Statutes at Large, c 61 p 158. Approved, August 11, 1921.]

(2) May 7, 1932:

AN ACT To amend section 11 of the Act approved February 22, 1889 (25 Stat. 676), relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 11 of the Act approved February 22, 1889 (25 Stat. 676), be, and the same is hereby, amended to read as follows:

"That all lands granted by this Act shall be disposed of only at public sale after advertising — tillable lands capable of producing agricultural crops for not less than $10 per acre and lands principally valuable for grazing purposes for not less than $5 per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the State.

"The said lands may be leased under such regulations as the legislature may prescribe; but leases for grazing and agricultural purposes shall not be for a term longer than five years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty years; and leases for development of hydroelectric power for a term not longer than fifty years.

"The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however*, That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

"With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent

disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various State institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any State may, however, in its discretion, add a portion of the annual income to the permanent funds.

"The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted."

SEC. 2. Anything in the said Act approved February 22, 1889, inconsistent with the provisions of this Act is hereby repealed. [47 U.S. Statutes at Large c 172 p 150. Approved, May 7, 1932.]

(3) June 25, 1938:

AN ACT To increase the period for which leases may be made for grazing and agricultural purposes of public lands donated to the States of North Dakota, South Dakota, Montana, and Washington by the Act of February 22, 1889, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That

so much of the second paragraph or section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended, as reads "but leases for grazing and agricultural purposes shall not be for a term longer than five years", is amended to read as follows: "but leases for grazing and agricultural purposes shall not be for a term longer than ten years". [52 U. S. Statutes at Large c 700 p 1198. Approved, June 25, 1938.]

(4) April 13, 1948:

AN ACT To authorize the States of Montana, North Dakota, South Dakota, and Washington to lease their State lands for production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, for such terms of years and on such conditions as may be from time to time provided by the legislatures of the respective States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the second paragraph of section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended, is amended to read as follows: "Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by

the legislatures of the respective States; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years." [62 U.S. Statutes at Large c 183 p 170. Approved April 13, 1948.]

(5) June 28, 1952:

AN ACT To authorize each of the States of North Dakota, South Dakota, and Washington to pool moneys derived from lands granted to it for public schools and various State institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fourth paragraph of section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended (47 Stat. 151), is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this section, each of the States of North Dakota, South Dakota, and Washington may pool the moneys received by it from oil and gas and other mineral leasing of said lands. The moneys so pooled shall be apportioned among the public schools and the various State institutions in such manner that the public schools and each of such institutions shall receive an amount which bears the same ratio to the total amount apportioned as the number of acres (including any that may have been disposed of) granted for such public schools or for such institutions bears to the total number of acres (including any that may have been disposed of) granted by this Act. Not less than 50 per centum

of each such amount shall be covered into the appropriate permanent fund." [66 U. S. Statutes at Large c 480 p 283. Approved June 28, 1952.]

(6) May 31, 1962:

AN ACT To amend the Act admitting the State of Washington into the Union in order to authorize the use of funds from the disposition of certain lands for the construction of State charitable, educational, penal, or reformatory institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States and to make donations of public lands to such States", approved February 12, 1889 (25 Stat. 676, as amended), is amended by inserting before the period at the end of the first sentence in the fourth paragraph of section 11 a comma and the following: "except that proceeds from the sale and other permanent disposition of the two hundred thousand acres granted to the State of Washington for State charitable, educational, penal, and reformatory institutions may be used by such State for the construction of any such institution". [Public Law 87-473. 76 U.S. Statutes at Large p 91. Approved May 31, 1962.]

(7) June 30, 1967:

AN ACT To authorize the States of North Dakota, South Dakota, Montana, and Washington to use the income from certain lands for the construction of facilities for State charitable, educational, penal, and reformatory institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second sentence of the fourth paragraph of section 11 of the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States", approved February 22, 1889 (25 Stat. 676), as amended, is amended to read as follows: "Rentals on leased land, proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income, shall be available for the acquisition and construction of facilities, including the retirement of bonds authorized by law for such purposes, and for the maintenance and support of such schools and institutions." [Public Law 90-41-81 U.S. Statutes at Large p 106. Approved June 30, 1967.]

(8) October 16, 1970:

AN ACT To amend section 11 of the Act approved February 22, 1889 (25 Stat. 676) as amended by the Act of May 7, 1932 (47 Stat. 150), and as amended by the Act of

April 13, 1948 (62 Stat. 170) relating to the admission to the Union of the States of North Dakota, South Dakota, Montana, and Washington, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second sentence of the first paragraph of section 11 of the Act approved February 22, 1889 (25 Stat. 676), as amended by the Act of May 7, 1932 (47 Stat. 150), is hereby amended to read as follows:

"Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to Federal lands that are surveyed, nonmineral, unreserved public lands within the State, or are reserved public lands within the State that are subject to exchange under the laws governing the administration of such Federal reserved public lands."

and that a new paragraph be added immediately following the above, as follows:

"All exchanges heretofore made under section 11 of the Act approved February 22, 1889 (25 Stat. 676), as amended by the Act approved May 7, 1932 (47 Stat. 150), for reserved public lands of the United States that were subject to exchange under law pursuant to which they were being administered and the requirements thereof have been met, are hereby approved to the same extent as though the lands exchanged were unreserved public lands."

and that the present paragraph 2 of section 11 be amended to read as follows:

"The said lands may be leased under such regulations as the legislature may prescribe." [Public Law 91-463. 84 U.S. Statutes at Large p 987. Approved October 16, 1970.]

SEC. 12. That upon the admission of each of said States into the Union, in accordance with the provisions of this act, fifty sections of the unappropriated public lands within said States, to be selected and located in legal subdivisions as provided in section ten of this act, shall be, and are hereby, granted to said States for the purpose of erecting public buildings at the capital of said States for legislative, executive, and judicial purposes.

Reviser's note: Section 12 has been amended by Congress as follows:

AN ACT To amend section 12 of the Act approved February 22, 1889 (25 Stat. 676) relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, by providing for the use of public lands granted to the States therein for the purpose of construction, reconstruction, repair, renovation, furnishings, equipment, or other permanent improvement or public buildings at the capital of said States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 12 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and

Washington, approved February 22, 1889, is amended to read as follows:

"That upon the admission or each of said States into the Union, in accordance with the provisions of this act, fifty sections of unappropriated public lands within such States, to be selected and located in legal subdivisions as provided in section 10 of this Act, shall be, and are hereby, granted to said States for public buildings at the capital of said States for legislative, executive, and judicial purposes, including construction, reconstruction, repair, renovation, furnishings, equipment, and any other permanent improvement of such buildings and the acquisition of necessary land for such buildings, and the payment of principal and interest on bonds issued for any of the above purposes."

SEC. 2. This Act shall take effect as of February 22, 1889. [Public Law 85-6. 71 U.S. Statutes at large p 5. Approved February 26, 1957.]

SEC. 13. That five per centum of the proceeds of the sales of public lands lying within said States which shall be sold by the United States subsequent to the admission of said States into the Union, after deducting all the expenses incident to the same, shall be paid to the said States, to be used as a permanent fund, the interest of which only shall be expended for the support of common schools within said States, respectively.

SEC. 14. That the lands granted to the Territories of Dakota and Montana by the act of February eighteenth, eighteen hundred and eighty-one, entitled "An act to grant

lands to Dakota, Montana, Arizona, Idaho, and Wyoming for university purposes," are hereby vested in the States of South Dakota, North Dakota, and Montana, respectively, if such States are admitted into the Union, as provided in this act, to the extent of the full quantity of seventy-two sections to each of said States, and any portion of said lands that may not have been selected by either of said Territories of Dakota or Montana may be selected by the respective States aforesaid; but said act of February eighteenth, eighteen hundred and eighty-one, shall be so amended as to provide that none of said lands shall be sold for less than ten dollars per acre, and the proceeds shall constitute a permanent fund to be safely invested and held by said States severally, and the income thereof be used exclusively for university purposes. And such quantity of the lands authorized by the fourth section of the act of July seventeenth, eighteen hundred and fifty-four, to be reserved for university purposes in the Territory of Washington, as, together with the lands confirmed to the vendees of the Territory by the act of March fourteenth, eighteen hundred and sixty-four, will make the full quantity of seventy-two entire sections, are hereby granted in like manner to the State of Washington for the purposes of a university in said State. None of the lands granted in this section shall be sold at less than ten dollars per acre; but said lands may be leased in the same manner as provided in section eleven of this act. The schools, colleges, and universities provided for in this act shall forever remain under the exclusive control of the said States, respectively, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes shall be used for the support of any sectarian or denominational school, college, or university. The section of land granted

by the act of June sixteenth, eighteen hundred and eighty, to the Territory of Dakota, for an asylum for the insane shall, upon the admission of said State of South Dakota into the Union, become the property of said State.

SEC. 15. That so much of the lands belonging to the United States as have been acquired and set apart for the purpose mentioned in "An act appropriating money for the erection of a penitentiary in the Territory of Dakota," approved March second, eighteen hundred and eighty-one, together with the buildings thereon, be, and the same is hereby, granted, together with any unexpended balances of the moneys appropriated therefor by said act, to said State of South Dakota, for the purposes therein designated; and the States of North Dakota and Washington shall, respectively, have like grants for the same purpose, and subject to like terms and conditions as provided in said act of March second, eighteen hundred and eighty-one, for the Territory of Dakota. The penitentiary at Deer Lodge City, Montana, and all lands connected therewith and set apart and reserved therefor, are hereby granted to the State of Montana.

SEC. 16. That ninety thousand acres or land, to be selected and located as provided in section 10 of this act, are hereby granted to each of said States, except to the State of South Dakota, to which one hundred and twenty thousand acres are granted, for the use and support of agricultural colleges in said States, as provided in the acts of Congress making donations of lands for such purpose.

SEC. 17. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth

section of the act of September fourth, eighteen hundred and forty-one, which act is hereby repealed as to the States provided for by this act, and in lieu of any claim or demand by the said States, or either of them, under the act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands to certain States, which grant it is hereby declared is not extended to the States provided for in this act, and in lieu of any grant of saline lands to said States, the following grants of land are hereby made, to wit:

To the State of South Dakota: For the school of mines, forty thousand acres; for the reform school, forty thousand acres; for the deaf and dumb asylum, forty thousand acres; for the agricultural college, forty thousand acres; for the university, forty thousand acres; for State normal schools, eighty thousand acres; for public buildings at the capital of said State, fifty thousand acres, and for such other educational and charitable purposes as the legislature of said State may determine, one hundred and seventy thousand acres; in all five hundred thousand acres.

To the State of North Dakota a like quantity of land as in this section granted to the State of South Dakota, and to be for like purposes, and in like proportion as far as practicable.

To the State of Montana: For the establishment and maintenance of a school of mines, one hundred thousand acres; for State normal schools, one hundred thousand acres; for agricultural colleges, in addition to the grant hereinbefore

made for that purpose, fifty thousand acres; for the establishment of a State reform school, fifty thousand acres; for the establishment of a deaf and dumb asylum, fifty thousand acres; for public buildings at the capital of the State, in addition to the grant hereinbefore made for that purpose, one hundred and fifty thousand acres.

To the State of Washington: For the establishment and maintenance of a scientific school, one hundred thousand acres; for State normal schools, one hundred thousand acres; for public buildings at the State capital, in addition to the grant hereinbefore made for that purpose, one hundred thousand acres; for State charitable, educational, penal, and reformatory institutions, two hundred thousand acres.

That the States provided for in this act shall not be entitled to any further or other grants of land for any purpose than as expressly provided in this act. And the lands granted by this section shall be held, appropriated, and disposed of exclusively for the purposes herein mentioned, in such manner as the legislatures of the respective States may severally provide.

SEC. 18. That all mineral lands shall be exempted from the grants made by this act. But if sections sixteen and thirty-six, or any subdivisions or portion of any smallest subdivision thereof in any township shall be found by the Department of the Interior to be mineral lands, said States are hereby authorized and empowered to select, in legal subdivisions, an equal quantity of other unappropriated lands in said States, in lieu thereof, for the use and the benefit of the common schools of said States.

SEC. 19. That all lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed, unreserved, and unappropriated public lands of the United States within the limits of the respective States entitled thereto. And there shall be deducted from the number of acres of land donated by this act for specific objects to said States the number of acres in each heretofore donated by Congress to said Territories for similar objects.

SEC. 20. That the sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to each of said Territories for defraying the expenses of the said conventions, except to Dakota, for which the sum of forty thousand dollars is so appropriated, twenty thousand dollars each for South Dakota and North Dakota, and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the Territorial legislatures. Any money hereby appropriated not necessary for such purpose shall be covered into the Treasury of the United States.

SEC. 21. That each of said States, when admitted as aforesaid, shall constitute one judicial district, the names thereof to be the same as the names of the States, respectively; and the circuit and district courts therefor shall be held at the capital of such State for the time being, and each of said districts shall, for judicial purposes, until otherwise provided, be attached to the eighth judicial circuit, except Washington and Montana, which shall be attached to the ninth judicial circuit. There shall be appointed for each of said districts

one district judge, one United States attorney, and one United States marshal. The judge of each of said districts shall receive a yearly salary of three thousand five hundred dollars, payable in four equal installments, on the first days of January, April, July, and October of each year, and shall reside in the district. There shall be appointed clerks of said courts in each district, who shall keep their offices at the capital of said State. The regular terms of said courts shall be held in each district, at the place aforesaid, on the first Monday in April and the first Monday in November of each year, and only one grand jury and one petit jury shall be summoned in both said circuit and district courts. The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction, and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The Marshal, district attorney, and clerks of the circuit and district courts of each of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully possessed and required to be performed by similar officers in other districts of the United States, and shall, for the Services they may perform, receive the fees and compensation allowed by law to other similar officers and persons performing similar duties in the State of Nebraska.

SEC. 22. That all cases of appeal or writ of error heretofore prosecuted and now pending in the Supreme Court of the United States upon any record from the supreme court of either of the Territories mentioned in this act, or that may hereafter lawfully be prosecuted upon any record from either

of said courts may be heard and determined by said Supreme Court of the United States. And the mandate of execution or of further proceedings shall be directed by the Supreme Court of the United States to the circuit or district court hereby established within the State succeeding the Territory from which such record is or may be pending, or to the supreme court of such State, as the nature of the case may require: *Provided*, That the mandate of execution or of further proceedings shall, in cases arising in the Territory of Dakota, be directed by the Supreme Court of the United States to the circuit or district court of the district of South Dakota, or to the supreme court of the State of South Dakota, or to the circuit or district court of the district of North Dakota, or to the supreme court of the State of North Dakota, or to the supreme court of the Territory of North Dakota, as the nature of the case may require. And each of the circuit, district, and State courts, herein named, shall, respectively, be the successor of the supreme court of the Territory, as to all such cases arising within the limits embraced within the jurisdiction of such courts respectively with full power to proceed with the same, and award mesne or final process therein; and that from all judgments and decrees of the supreme court of either of the Territories mentioned in this act, in any case arising within the limits of any of the proposed States prior to admission, the parties to such judgment shall have the same right to prosecute appeals and writs of error to the Supreme Court of the United States as they shall have had by law prior to the admission of said State into the Union.

SEC. 23. That in respect to all cases, proceedings, and matters now pending in the supreme or district courts of either of the Territories mentioned in this act at the time of the

admission into the Union of either of the States mentioned in this act, and arising within the limits of any such State, whereof the circuit or district courts by this act established might have had jurisdiction under the laws of the United States had such courts existed at the time of the commencement of such cases, the said circuit and district courts, respectively, shall be the successors of said supreme and district courts of said Territory; and in respect to all other cases, proceedings and matters pending in the supreme or district courts of any of the Territories mentioned in this act at the time of the admission of such Territory into the Union, arising within the limits of said proposed State, the courts established by such State shall, respectively, be the successors of said supreme and district Territorial courts; and all the files, records, indictments, and proceedings relating to any such cases, shall be transferred to such circuit, district, and State courts, respectively, and the same shall be proceeded with therein in due course of law; but no writ, action, indictment, cause or proceeding now pending, or that prior to the admission of any of the States mentioned in this act, shall be pending in any Territorial court in any of the Territories mentioned in this act, shall abate by the admission of any such State into the Union, but the same shall be transferred and proceeded with in the proper United States circuit, district or State court, as the case may be: *Provided, however*, That in all civil actions, causes, and proceedings, in which the United States is not a party, transfers shall not be made to the circuit and district courts of the United States, except upon written request of one of the parties to such action or proceeding filed in the proper court; and in the absence of such request such cases shall be proceeded with in the proper State courts.

SEC. 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures and Representatives in the fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two senators of the United States; and the governor and secretary of state of such proposed State shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

SEC. 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed.

Approved, February 22, 1889. [25 U.S. Statutes at Large, c 180 p 676.]

(2)

No. 99-964

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

STATE OF WASHINGTON,
Cross-Petitioner,

v.

DONALD RAY BUCHANAN,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the Washington Supreme Court

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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REASONS FOR DENYING THE WRIT

A. The Washington Supreme Court Followed *Minnesota v. Mille Lacs* and Prior Procedent of This Court Regarding The "Equal Footing" Doctrine.

In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S. Ct. 1187 (1999), this Court reaffirmed that in order to abrogate Indian treaty rights, Congress must "clearly express its intent to do so." 119 S. Ct. at 1204, *citing United States v. Dion*, 476 U.S. 734, 738-740 (1986);[1] *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

> There must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."

119 S. Ct. at 1204. The *Mille Lacs* Court found that because the Minnesota Enabling Act and its legislative history were silent regarding the Enabling Act's effect on Indian treaty rights, there was no "clear evidence" of congressional intent to abrogate the Chippewa Treaty rights. *Id.*

> [T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood. Treaty rights are not impliedly terminated upon statehood.

Id. at 1206.

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[1] Cross-Petitioner's assertion that *Dion* "dealt only with on-reservation hunting rights," Cross-Petition at 9, is not supported by the *Dion* Court's rationale, by the cases *Dion* relied upon, or by any subsequent caselaw.

As in the *Mille Lacs* case, the State[2] cannot point to language in the Washington Enabling Act or its legislative history to suggest that Congress intended to limit Indian treaty rights. The Washington Supreme Court followed *Mille Lacs*, contrasting the Washington Act with Wyoming's Enabling Act, examined in *Ward v. Race Horse*, 163 U.S. 504 (1895):

> Washington's enabling act, 25 Stat. 676 (1889), differs from the statute admitting Wyoming to the union, in that the statute admitting Washington reserves from Washington the right to control lands owned or held by any Indian or Indian tribe. 25 Stat. 676-77 (1889). This clause makes it clear that Congress had the Indians' treaty rights in mind when it created the State of Washington, but did not go on to expressly abrogate the treaty hunting rights.

App. to Petition at A28.

B. The Stevens Treaties Are Different From the Treaty Examined in *Race Horse*, So There is No Conflict.

Without any support from the language of the Stevens Treaties or treaty negotiations, Cross-Petitioner argues that the right to hunt in the Stevens Treaties was not intended by Congress to survive statehood. The only basis for this argument is that the language in the 1868 Crow Treaty, 15 Stat. 673, is somewhat similar.[3]

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[2] Although Cross-Petitioner, the Yakima County Prosecutor's Office, argued the "equal-footing" doctrine below, the Washington Attorney General's Office did not advance this argument in its amicus brief.

[3] As noted in *Mille Lacs*:

> [T]he State's argument that similar language in two Treaties involving different parties has precisely the same meaning reveals a fundamental misunderstanding of basic principles of treaty construction . . . [In Klamath] we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words.

119 S. Ct. at 1203.

The Crow Treaty examined in *Race Horse* restricted off-reservation tribal hunting to "the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." The *Race Horse* Court found that the parties intended the Crow Treaty right to continue only so long as the hunting grounds remained unoccupied and owned by the United States, and that the termination of these conditions was "clearly contemplated" when the Treaty was ratified. *Id.* at 509. The *Race Horse* Court's determination that the parties intended this treaty right to end when the United States gave away control of the Territory to a sovereign State, *id.* at 510, was based on the specific language of the Treaty, and on the circumstances surrounding its negotiation.

On the other hand, in *Tulee v. Washington*, 315 U.S. 681 (1942), this Court examined the Yakima Treaty of 1859 (one of the Stevens Treaties) to determine the "scope of the reserved rights of hunting and fishing." 315 U.S. at 684. The Court held that these off-reservation treaty rights were only subject to state regulations that were necessary for conservation. Justice Thomas, dissenting in *Mille Lacs*, noted:

> [The *Tulee Court's*] conclusion was driven by the language of the Treaty as well as the report of the Treaty negotiations and what it revealed to be the Yakima's understanding of the Treaty—to preserve their right "to hunt and fish in accordance with the immemorial customs of their tribes." *Id.* at 684.

119 S. Ct. at 1213.

In contrast to the Crow Treaty, the Stevens Treaties reserved the right of Washington tribes to hunt "on open and unclaimed lands" in accordance with their immemo-

rial customs. Although it was contemplated that these lands would diminish as settlement occurred, the treaty negotiations show that the parties intended this right to be an enduring one. *See, e.g.*, Petitioner's Reply Brief 1, n. 1; *State v. Chambers*, 81 Wn.2d 929, 935-936, 506 P.2d 311, 315 (1973).[4]

C. Washington's "Conservation Necessity" Standard Was Not Challenged Below.

Cross-Petitioner's challenge to the "conservation necessity" standard used by the Washington Supreme Court in *State v. Miller*, 102 Wn.2d 678, 689 P.2d 81 (1984), was not raised below, and should not be raised to this Court. *See Heckler v. Campbell*, 461 U.S. 458, 468-469, n.12 (1983). As noted below:

> The trial court entered a finding of fact . . . that the State had failed to sustain its burden of proving that the application of its regulations to Nooksack Indians or to Point Elliott Treaty hunters is necessary for conservation. The State did not assign error to this finding and, therefore, it is a verity on appeal. . . . The question of whether the State's regulations, which closed the hunting season, restricted the taking of antlered elk and established a winter feeding station,

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[4] Cross-Petitioner's argument that public forestlands are not "open and unclaimed" has been rejected by every reported decision to consider the issue. *E.g., Holcomb v. Confederated Tribes of Umatilla Reservation*, 382 F.2d 1013 (9th Cir. 1967) ("unclaimed lands" within the Whitman National Forest); *United States v. Hicks*, 587 F. Supp. 1162, 1165 (W.D. Wash. 1984) (national forest lands are "open and unclaimed"); *State v. Miller*, 689 P.2d 81 (Wash. 1984) ("open and unclaimed" lands within Olympia National Forest); *State v. Stasso*, 563 P.2d 562 (Mont. 1977) ("open and unclaimed" lands within national forest); and *State v. Arthur*, 261 P.2d 135 (Idaho 1953) ("open and unclaimed lands" within Nez Perce National Forest).

> are necessary conservation measures is not properly before the court.

App. to Petition at A22-23.

Cross-Petitioner's arguments about the "conservation necessity" standard are overstated and ignore the benefits that cooperative State/Tribal management has provided for fisheries in Washington over the years. An extensive brief providing an overview of tribal management and co-operation regarding off-reservation hunting was filed before the Washington Supreme Court. *See* App. to Petition at A5-6.

The Washington Supreme Court's iteration of the "conservation necessity" standard in this case was taken from language in *Antoine v. Washington*, 420 U.S. 194, 207 (1975), and *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968). App. to Petition at A22. Cross-Petitioner is asking this Court to overturn established precedent, reaffirmed in *Mille Lacs*, on an issue that was not raised below.

CONCLUSION

For the reasons set forth above the Conditional Cross-Petition should be denied.

Respectfully submitted,

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